

1993

The State of Utah v. Ronald L. Boren : Reply Brief

Utah Court of Appeals

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IN THE COURT OF APPEALS OF THE STATE OF UTAH

THE STATE OF UTAH, :
Plaintiff/Appellee, :
v. :
RONALD L. BOREN, : Case No. 930275-CA
Defendant/Appellant. : Priority No. 2

REPLY BRIEF OF APPELLANT

Appeal from a judgment and conviction for Theft, a third degree felony, in violation of Utah Code Ann. § 76-6-404 (1990), in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Ronald O. Hyde, Judge, presiding.

**UTAH COURT OF APPEALS
BRIEF**

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FILED
Utah Court of Appeals

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V. C.

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INTRODUCTION

Mr. Ronald Boren relies on his opening brief and also refers to that brief for the statements of jurisdiction, the issues, the case, and the facts. He replies to the State's brief as follows.

SUMMARY OF THE ARGUMENT

Theft requires proof of a "permanent" intent to deprive. This essential mens rea element, however, was excluded from the jury instructions. The theft conviction improperly rested on the less culpable showing of a "temporary" intent.

The jury instructions also allowed the jury to simply presume that Mr. Boren possessed a criminal intent when the State presented nothing more than a predicate fact.

ARGUMENT

POINT I

THE INSTRUCTIONS PREVENTED THE JURY FROM DISTINGUISHING BETWEEN THE DIFFERENT LEVELS OF INTENT

(Reply to Point I of Appellee's Brief)

In its brief, the State argues that since "[j]ury Instruction 9 tracked Utah Code Ann. § 76-[6]-404 (1990) verbatim[,]" there was no error. Appellee's brief, Point I.B. However, such verbatim tracking proved erroneous in the case at bar because the statute (and Instruction 9 both) failed to distinguish between the "permanent" intent required for theft, and the "temporary" intent contained in the lesser offenses.¹ See Opening brief of Mr. Boren, Point I. The distinction was critical. State v. Laine, 618 P.2d 33 (Utah 1980) (emphasis added) (trial court committed reversible error for giving an instruction which purported to state the essential elements of the crime, "but fail[ed] to expressly include the element that the defendant must be found to have intended to permanently deprive the owner of possession of the automobile").

Due to the lower court's denial of Mr. Boren's requested instruction, (R 383-84), proof of a "temporary" intent was all that the State needed to establish a theft. See (R 195); Opening brief of Mr. Boren, Addendum D. Since the jury did not have to find a

1. Furthermore, the differences in intent subjected Ronald Boren to a far greater penalty and potential period of incarceration. Compare Utah Code Ann. § 76-6-404 (theft, a second degree felony, carries a potential 1-15 year prison term), with Utah Code Ann. § 41-1a-1311(1) unauthorized control over a motor vehicle is a class A misdemeanor with no prison term).

"permanent" intent for the greater offense, the defective instructions relieved the State of its burden of proof.

On a related point, the State contends, "Defendant's requested addition of the word 'permanently' restricts the crime of theft to only one of three statutory definitions and is therefore, a misstatement of the law." Appellee's brief, Point I.C. According to the State, "permanently" applies only to subsection (a) while a less culpable mental state suffices for subsections (b) and (c). Appellee's brief, page 7; Utah Code Ann. § 76-6-401(3)(a)-(c).

Contrary to its claims, a theft conviction may not rest simultaneously upon proof of a "permanent" intent and upon proof of a "temporary" intent.² Such an interpretation illustrates precisely how the jury was misled on the requisite intent. Even under alternative subsections, the crime of theft cannot encompass such drastically different mental states particularly when lesser offenses were at issue.

The clear mandate from the instructions prevented the jury from considering the lesser offenses. See (R 195-96) (Instructions 11 & 12). Those offenses were not to be considered unless the jury had initially found "the accused 'not guilty' of the greater offense [theft] as charged in the information and defined in these instructions[.]" (R 195-96). That mandate, together with the ill-defined greater offense instruction, deprived the jury of the

2. However, proof of a less permanent intent (i.e. a temporary intent to deprive) may have addressed other included crimes--lesser offenses which the jury was unable to consider. (R 196-99).

ability to even focus on the appropriate intent. In short, the jury did not have the opportunity to consider Mr. Boren's theory of the case and to "[reject] [the] lesser included charges. . ." See Appellee's brief, page 8.

POINT II

THE INSTRUCTIONS IMPROPERLY ALLOWED THE JURY TO PRESUME INTENT ON NOTHING MORE THAN A PREDICATE FACT

(Reply to Point II of Appellee's Brief)

The State correctly notes that "none of the instructions in this case contained [the] impermissible language [contained in other cases.]" Appellee's brief, page 9. However, while the wording here is slightly different, the unconstitutional presumption still remains. For example, even though the involved wording in State v. Chambers, 709 P.2d 321 (Utah 1985), and State v. Johnson, 745 P.2d 452 (Utah 1987), did not mirror the contested language of leading United States Supreme Court decisions, our state supreme court nonetheless recognized the unfairness of similarly phrased instructions. See Opening brief of Mr. Boren, pages 14-15; see also State v. Workman, 806 P.2d 1198, 1202 (Utah App. 1991) (citation omitted) (substance over form is the pertinent inquiry).

The instructions given in Mr. Boren's trial only required the jury to determine whether the property would be restored "upon payment of a reward or other compensation[.]" (R 194). Once the State presented such evidence, the instructions allowed the jury to simply presume a criminal intent. Rather than being left with the

opportunity to possibly infer intent,³ the instructions instead limited the extent of the jury's deliberations. Unless Boren proved otherwise, his hope for compensation was presumptively equated to a "purpose to deprive." Mere evidence of this predicate fact "meant" a purpose to deprive. (R 194).⁴ The instructions relieved the State of its burden of proof.

The improper shifting of the burden is not saved by the "conscious objective" language emphasized by the State. See Appellee's brief, pages 9-11. A "purpose to deprive" may constitute either a conscious objective to "temporarily" deprive or a conscious objective to "permanently" deprive. Besides the flawed nature of

3. As previously explained in State v. Robichaux, 639 P.2d 207 (Utah 1981):

Given the high standard of proof in a criminal case, and the relative burdens on the prosecution and the defense, the jury should, at most, be told that it may, on the basis of all the evidence, including the inference that people usually intend the natural consequences of their acts, find that the defendant intended the natural consequences of his act. Had that been the case, the jury would have had to consciously make a finding as to whether the prosecution had proved the requisite intent. But under the instructions given, that intent was at least initially established as a matter of law, and the burden of persuasion, in the jury's mind, may well have been shifted to the defendant.

Id. at 210 (Hall, C.J.) (emphasis in original).

4. Cf. Sandstrom v. Montana, 442 U.S. 510, 517 (1979) ("a reasonable jury could well have interpreted the presumption as 'conclusive,' that is, not technically as a presumption at all, but rather as an irrebuttable direction by the court to find intent once convinced of the facts triggering the presumption").

the mens rea definition, see supra Point I., the "conscious objective" language still saddled Mr. Boren with the burden of proving the applicability of a less culpable mental state.

When the instructions are read as a whole, they failed to allow the jury to consider Boren's theory of the case and they created an unconstitutional mandatory presumption. The trial court erred in refusing to properly instruct the jury.

CONCLUSION

Mr. Boren respectfully requests this Court to reverse his conviction and to remand this case for a new trial.

SUBMITTED this 17th day of December, 1993.

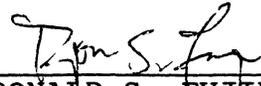


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CERTIFICATE OF DELIVERY

I, RONALD S. FUJINO, hereby certify that I have caused eight copies of the foregoing to be delivered to the Utah Court of Appeals, 400 Midtown Plaza, 230 South 500 East, Salt Lake City, Utah 84102, and two copies to the Attorney General's Office, 236 State Capitol, Salt Lake City, Utah 84114, this 17th day of December, 1993.



RONALD S. FUJINO

DELIVERED by _____ this ____ day
of December, 1993.
